

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION**

**CURTIS HARRIS,**

**Plaintiff,**

**v.**

**Case No. 5:05-cv-113  
Hon. Gordon J. Quist**

**DR. RODNEY L. KILPATRICK,  
*et al.*,**

**Defendants.**

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**REPORT AND RECOMMENDATION**

This is a civil rights action brought by a state prisoner pursuant to 42 U.S.C. § 1983. Plaintiff seeks compensatory and punitive damages against defendants in the amount of \$15,000,000.00. This matter is before the court on the motion to dismiss pursuant to Fed. Rules Civ. Proc. 12(b)(1) and 12(b)(6) filed by defendants (docket no. 11).

Plaintiff's complaint identifies defendants as employees of the Michigan Department of Corrections and states that "I am suing defendants in an Official Capacity." Compl. at 6. In their motion, defendants Christina Forrest, Mary Schiebner and Donna Allmon seek to dismiss plaintiff's complaint on Eleventh Amendment grounds. Plaintiff's claims as alleged in the complaint, which seek monetary damages against defendants acting in their official capacity, would be precluded by the Eleventh Amendment. *See Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989); *Flaim v. Medical College of Ohio*, 418 F.3d 629, 637 n. 3. (6th Cir. 2005). However, plaintiff has since amended his complaint to sue defendants in their individual capacities. Plaintiff's amended

complaint cures the defect identified by defendants. Accordingly, defendant's motion to dismiss should be denied as moot.

**RECOMMENDATION**

I respectfully recommend that defendants' motion to dismiss (docket no. 11) be

**DENIED.**

Dated: May 5, 2006

/s/ Hugh W. Brenneman, Jr.  
Hugh W. Brenneman, Jr.  
United States Magistrate Judge

ANY OBJECTIONS to this Report and Recommendation must be served and filed with the Clerk of the Court within ten (10) days after service of the report. All objections and responses to objections are governed by W.D. Mich. LCivR 72.3(b). Failure to serve and file written objections within the specified time waives the right to appeal the District Court's order. *Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).